IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1120

CRIMINAL

---o---

ALGIE LEONARD OLSEN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

---o---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---o---

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Your petitioner, Algie Leonard Olsen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on December 15, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals has not as yet been reported. A copy of such opinion is separately attached hereto in Appendix No. 1.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on December 15, 1978. (Appendix 1.) This judgment affirms the judgment of the United States District Court for the District of Nebraska.

The statutory provisions believed to confer on the United States Supreme Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the absence of sanction in the Federal Speedy Trial Act for failure to retry a defendant after a mistrial within 60 days as required by the Act mean that there is no remedy for failure to begin trial on time?

2. Does the failure to include the sanction for failure to timely retry the defendant after mistrial in the section of the Federal Speedy Trial Act postponing the application of sanctions evidence the intent of Congress to require the courts to apply the sanction immediately?

3. Does the District Court have any discretion to deny a dismissal of an indictment under the Federal Speedy Trial Act based on whether the defendant has proved prejudice or other disadvantage caused by the delay?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

UNITED STATES CODE SECTIONS

"Sec. 3161. Time limits and exclusions

"(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

"(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual

has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

"(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

"(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against the individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent com-

plaint, indictment, or information, as the case may be.

"(e) If the defendant is to be tried again following a declaration by the trial judge or a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

"(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

"(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this sec-

tion as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

"(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

"(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . .

"(A) Delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

"(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

"(C) delay resulting from trials with respect to other charges against the defendant;

"(D) delay resulting from interlocutory appeals;

"(E) delay resulting from hearings on pretrial motions;

"(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

"(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

"(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

"(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

"(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be

obtained by due diligence or he resists appearing at or being returned for trial.

"(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

"(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of Title 28, United States Code.

"(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

"(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

"(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh

the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

"(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

"(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

"(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

"(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grant jury or by

events beyond the control of the court or the Government.

"(C) No continuance under paragraph (8) (A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

"(i) If trial did nct commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

"(j) (1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly —

"(A) undertake to obtain the presence of the prisoner for trial; or

"(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

"(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

"(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

"(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

"Added Pub. L 93-619, Title I, Sec. 101, Jan. 3, 1975, 88 Stat. 2076."

"Sec. 3162. Sanctions

"(a) (1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161 (b) as extended by section 3161(h) of this chapter

such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

"(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

"(b) In any case in which counsel for the defend-

ant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

"(A) in the case of an appointed defendant counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

"(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

"(C) by imposing on any attorney for the Government a fine of not to exceed $250;

"(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

"(E) by filing a report with an appropriate disciplinary committee.

"The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

"(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

"Added Pub. L. 93-619, Title I, Sec. 101, Jan. 3, 1975, 88 Stat. 2079."

"Sec. 3163. Effective dates

"(a) The time limitation in section 3161(b) of this chapter —

"(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

"(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

"(b) The time limitation in section 3161(c) of this chapter —

"(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

"(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

"(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975.

"Added Pub. L. 93-619, Title I, Sec. 101, Jan 3, 1967, 88 Stat. 2080."

STATEMENT OF THE CASE

This is a case filed against the defendant alleging violations of Title 18, United States Code, Sections 1343 and 2. These charges are fraud by wire and aiding and abetting fraud by wire. The indictment also charged four other persons, LaVoy Rexford Orner, Janice Orner, Terry Lynn Hass, Robert W. White. The United States District Court for the District of Nebraska invoked jurisdiction over the defendant by virtue of 18 U.S.C. Section 3231 which gives the United States District Court jurisdiction over all offenses against the laws of the United States.

After a plea of not guilty, trial to the jury began on Thursday, May 25, 1978, at 9 o'clock a.m. On May 31, 1978, the jury informed the court that it could not reach a decision on Counts V, VI, VII and VIII, but that it found the defendant not guilty on Count IX. The Court dismissed the jury, and thereafter, on June 5, 1978, the Court entered an order of mistrial in the indictment as to Counts V, VI, VII and VIII.

Thereafter, on August 15, 1978, the defendant filed a motion to dismiss because of failure of speedy trial. Hearing was had on the motion on August 28, 1978, and the court entered an order overruling the motion on August 30, 1978. The transcript of the remarks of the court at the conclusion of the hearing on August 28, 1978, is set out in Appendix No. 2 attached hereto.

Jury trial began for the defendant on August 31, 1978, and the jury returned a verdict of guilty on Counts V, VI and VIII, and not guilty on Count VII. The defendant was sentenced on September 13, 1978, to a period of three years of imprisonment.

Notice of appeal was filed on September 13, 1978, and thereafter on December 15, 1978, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court in Case No. 78-1673. The opinion of the court is set out in Appendix No. 1 attached hereto.

On December 28, 1978, the defendant filed a motion for rehearing and a motion for rehearing in banc with the Eighth Circuit Court of Appeals. As of the date of filing of this petition for Writ of Certiorari, no word has been received as to the disposition of that motion. In the motion for rehearing and rehearing in banc, the defendant, the appellant herein, submitted to the Court of Appeals that their holding that Title 18, U.S.C., Sec. 3163(c) applied to this case was misapprehended. That subsection decrees that the speedy trial act shall not become effective until July 15, 1979. It is the contention of the defendant, appellant and petitioner herein, that the postponement of the effective date of the Federal Speedy Trial Act does not apply to the petitioner's case.

STATEMENT OF FACTS

This is a criminal action brought against Algie Leonard Olsen, the defendant and petitioner, by the United States of America through an indictment filed in the District Court for the District of Nebraska on July 14, 1977. This indictment charged that the defendant, along with others, devised a scheme to defraud farmers and livestock feeders of money in connection with the sale of livestock to persons in the District of Nebraska and elsewhere. Of twelve original counts in the indictment, the petitioner Olsen was charged with six counts.

The indictment charged that a man named LaVoy Rexford Orner, also a defendant, the petitioner Olsen, and three others devised and carried out a

scheme whereby cattle were sold to farmers by the use of false representations as to their origin. The indictment also charged that some farmers were charged for more pounds of cattle than were actually delivered to them by the use of false weight tickets and that the farmers were charged for more shipping costs by charging false mileage.

On May 25, 1978, the trial of the case of United States v. Olsen was begun in the Federal District Court for the District of Nebraska in Lincoln, Nebraska. On May 30, 1978, at the end of plaintiff's case in chief, the court dismissed Count I of the indictment as it applied to the petitioner Olsen.

The first trial of this case ended in a mistrial as to Counts V, VI, VII and VIII on May 31, 1978. The petitioner was found not guilty of Count IX of the indictment. Subsequently, the petitioner Olsen filed a motion to dismiss the indictment against him on August 15, 1978, based on the fact that more than sixty days had passed since the court declared a mistrial in the first trial, and neither the court nor the Government had brought the petitioner to trial within sixty days as required by 18 U.S.C. 3161(e). A hearing was held on the motion to dismiss on August 30, 1978, and the court overruled the motion after argument. The court overruled the motion, saying at the time of the hearing that the court had discretion about whether to dismiss the case under this section and that the court did not feel that the defendant had been prejudiced by the delay. See Appendix No. 2 attached hereto.

Thereafter on August 31, 1978, a second trial was had before the District Court for the District of Nebraska. On September 1, 1978, a verdict of guilty was received by the court as to Counts V, VI, and VIII, with the verdict of not guilty being received for Count VII. The defendant was sentenced on September 13, 1978, to a period of imprisonment of three years.

REASONS FOR ALLOWING THE WRIT

I.

Sanction for failure to timely retry after mistrial.

The Federal Speedy Trial Act, Title 18, U. S. Code, Section 3161 through Section 3174, sets out periods of time during which Federal criminal defendants can be tried. The specific part of the Act that applies to your petitioner is Section 3161(e). That subsection addresses the situation of a criminal defendant who has been tried but for one reason or another a mistrial has been ordered by the trial judge. That subsection requires the defendant to be retried within sixty days of the date of the action which occasioned the retrial.

The problem with the use of this subsection in the petitioner's case, however, is that there is no sanction in the Act for failure to retry the defendant on time. The sanctions for failure to meet the time limits set out in Section 3161 are found in Section 3162. A search of Section 3162, however, discloses

no mention of a failure to retry the defendant on time.

The first question which arises in the petitioner's case, therefore, is whether there is any remedy for the failure of the Government to bring the petitioner to trial after a mistrial within the sixty day period.

The petitioner argued before the Eighth Circuit Court of Appeals that the only remedy available had to be the remedy of dismissal of the indictment against the defendant. This argument was based not only on the clear intent of Congress as expressed in Section 3162 of the Federal Speedy Trial Act, but also upon *Strunk v. U. S.*, 412 U. S. 434, 93 S. Ct. 2260, 37 L. Ed. 2d 56 (1973). In *Strunk* this court held that as a matter of constitutional law, dismissal of the charges against a criminal defendant is the only effective remedy where a denial of the right to speedy trial has been established.

Under Rule 19 of the rules of this court, considerations governing the granting of a writ of certiorari include review of decisions from a court of appeals which has decided an important question of federal law but which has not been and should be settled by this court [Rule 19(b)].

At this point, all of the federal district courts are faced with the question of what to do in a situation where a criminal defendant is not retried after a mistrial within the sixty day period prescribed by Section 3161(e). Since the Federal Speedy Trial Act

sanctions are just now coming into force, this court should determine whether these sanctions specifically apply to retrials after mistrial, whether the sixty day period simply becomes the bench mark to determine whether the right to a speedy trial has been violated, leaving the remedy to the rule as outlined in *Strunk*, or whether some other remedy should be applied.

II.

Does postponing sanctions apply to retrials after mistrial?

When the Federal Speedy Trial Act was passed in 1974, Congress provided that the sanctions that they listed in section 3162 shall not become effective for a period of four years, or until July 1, 1979. See Title 18, U.S.C. Section 3163(c).

However, as previously noted, the section that provides the sanction for failure to retry the defendant after a mistrial are not included in Section 3162. On the face of the statute, therefore, there is no provision for postponing any remedy which might exist for failure to provide a trial within sixty days after a mistrial. Under these circumstances, it has been argued that until the sanctions come into effect that the constitutional right as set out in *Strunk v. U.S., supra,* to an absolute dismissal of the charges is the one that remains. See Russ and Mandelkern, the Speedy Trial Act of 1974: a Trap for the Unwary

Practitioner, 2 Crim. Def. J. 1, 31 and Title 18, U.S.C. Section 3173.

The other side of the coin involved in this issue is the question of whether the Congress intended to exempt retrials after mistrial from the postponement in the implementation of the sanctions under Section 3163(c).

In the petitioner's motion for rehearing and rehearing in banc filed before the Eighth Circuit Court of Appeals, he argued that under the rule of statutory construction cited as *expressio unius est exclusio alterius* the court has to assume that the failure to list the sanction for the failure to retry a defendant after a mistrial was intentional. See *U.S. v. Jones*, 567 F. 2d 965 (C. A., 10th, 1977).

This rule of construction says that if a statute creates a list of exceptions and the matter under consideration is what would generally be considered available to be one of the exceptions, then its failure to be included must be considered intentional on the part of Congress. Using this rule, your petitioner has argued that the statute postponing the effective date of the sanctions does not apply to the provision dealing with retrial after mistrials.

In addition, there are ample and reasonable public policy reasons for this argument. Certainly no other case presents less excuse for delay than one which has already been brought to trial once, and trial has concluded unsuccessfully. The only thing necessary

should be the gathering of a new jury to hear the facts. Further, since delay after a mistrial is in addition to all of the time that it has taken to get the matter to trial in the first place, this delay is in addition to and would aggrevate any delay caused in getting the matter to trial in the first place. One of the most important and dominant criticisms of the Federal Speedy Trial Act has been provisions therein which might allow the stacking of delay upon delay because of the possibility of dismissing a case without prejudice after a violation of the Act. See Steinberg, Rights to Speedy Trial: The Constitutional Right and its Applicability to the Speedy Trial Act of 1974, 66 Crim. Law and Crim. 229, 234, 235, 1975; Russ and Mandelkern, *Id.*, 27, 28. Finally, while organizing the Federal District Courts to implement the main parts of the Federal Speedy Trial Act may require certain decisions of organization and management, perhaps including the implementation of further staffing, there seems to be little justification for allowing such matters to interfere with retrial of a defendant after a mistrial, when the only thing that is needed is to set a new date and call a new jury.

III.

Is prejudice required under the Federal Speedy Trial Act?

Commentators who have interpreted the Federal Speedy Trial Act seem to be agreed that dismissal either with or without prejudice is mandatory under

the Act without any showing of prejudice to the defendant. See Russ and Mandelkern, *Id.*, 14; Steinberg, *Id.*, 234. The trial court in the petitioner's case, however, clearly used prejudice as one of the criteria to determine whether in fact an indictment against the petitioner should be dismissed.

The court has long held that the right to speedy trial as pronounced by the Sixth Amendment is one which is relative rather than absolute. Thus the question of whether a defendant has been denied his constitutional right to speedy trial has been dependent upon the circumstances in a particular case, rather than upon any absolute periods of time. See Cranmore, Court Encounters of the Slowest Kind, the District of Columbia's Implementation of the Amorphous Right to a Speedy Trial, 21, Catholic U.L. Rev., 627, 1978: and *Barker v. Wingo,* 407 U. S. 514, 521, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The petitioner contends, however, that in enacting specific time limits set out in days, plus in trading the absolute right to complete discharge as pronounced in *Strunk v. U. S., supra,* for a more flexible remedy of dismissal with or without prejudice, the Congress has decided that implementation of this constitutional right requires legislative determination of specific rights and remedies. By setting them out in the Federal Speedy Trial Act they set standards which are clear and definite for federal trials and which do not require the proof of any particular prejudice against the defendant in order to establish the violation of his right.

Under Rule 19 of the Rules of this court, a writ of certiorari should be issued to make clear to the federal system that prejudice to the defendant does not have to be proved by the defendant and that a simple violation of the time limits as set out in the Act are to be considered the equivalent of proving prejudice and therefore require the dismissal of the indictment or charge.

CONCLUSION

The Federal Speedy Trial Act of 1974 has presented to the federal court system a new challenge in providing prompt and speedy justice to persons charged with crimes. It presents to these courts a new method and procedure of dealing with the issue of whether a criminal defendant has been denied a speedy trial. Instead of weighing considerations and circumstances in a particular case, the Act requires the courts to measure days from the time of arrest, filing of the indictment, and from the ordering of a mistrial under Title 18 U.S.C. 3161(e). If the number of days have passed, the Act requires the dismissal of the charge, not with prejudice as the constitutional law requires under *Strunk v. U.S., supra,* but either with or without prejudice as the importance of the case requires.

With thousands of criminal cases being brought before federal courts each year, the issues presented in this case are important to the whole federal system. This case presents the court with an opportunity to make clear that the sanctions of dismissal for

failure to retry a defendant within sixty days apply, and that prejudice not only does not apply to such a retrial situation, but also to the other time periods listed in the federal act.

Respectfully submitted,

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APPENDIX 1

United States Court of Appeals
For the Eighth Circuit

No. 78-1673

United States of America, Appellee, v. Algie Leonard Olsen, Appellant.	* * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska.

Submitted: December 11, 1978

Filed: December 15, 1978

Before HEANEY, ROSS and MCMILLIAN, Circuit Judges.

PER CURIAM.

Algie Leonard Olsen appeals from his conviction of fraud by wire and aiding and abetting fraud by wire, in violation of 18 U.S.C. §§ 1343 and 2. We affirm.

Olsen first contends that since more than sixty days elapsed between the time when a mistrial was declared in his first trial and the time when his second trial, which resulted in conviction, commenced, he was not accorded a speedy trial as required by 18 U.S.C. § 3161(e). He therefore contends that, under 18 U.S.C. § 3162, the indictment against him should have been dismissed.

Olsen's first trial began on May 25, 1978 and continued through May 31, 1978. At that time, the jury

informed the court that it could not reach a verdict. An order of mistrial was entered by the court on June 5, 1978. Retrial of Olson did not commence until August 31, 1978, more than sixty days after the order of mistrial had been entered in the first trial.

Assuming, as Olsen contends, that the sanctions set forth in 18 U.S.C. § 3162 for failure to comply with the various time limitations of the Speedy Trial Act apply to the delay in retrial which is present here,[1] no dismissal of the indictment was required. Section 3163(c) of the Act states that the sanctions set forth in § 3162 "shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975." Thus, the dismissal sanctions of § 3162 will not be effective until after July 1, 1979. *United States v. Buffington,* 578 F. 2d 213, 215 (8th Cir. 1978), and the dismissal of the indictment against Olsen was not required.

Olsen next contends that the trial court erred in admitting the testimony of Robert Kemerling. The wire fraud with which Olsen and four others were charged involved a scheme to defraud farmers and livestock feeders of money in connection with the sale of livestock to persons in Nebraska and elsewhere. Robert Kemerling, a government witness, testified that during a period approximately one or two years prior to the alleged overt acts by Olsen, Kemerling delivered cattle for Olsen and for a codefendant, Lavoy Orner. He testified that Olsen was often present when the cattle were sorted at the

[1]Sanctions for violation of § 3161(b), delay between arrest and the filing of an indictment or information, and for violation of § 3161(c), delay in the arraignment or trial of the accused, are set forth in § 3162. No specific sanction for violation of § 3161(e), delay in retrial, is set forth in § 3162 or elsewhere in the Act.

stockyards, and that Orner would give him "light" and "heavy" weight tickets for the same load of cattle to give to Olsen, presumably to enable Olsen to mislabel underweight cattle for sale to others. Kemerling also testified that Olsen instructed him to misrepresent the point of origin of cattle, also, presumably, to falsely enhance their value. Olsen contends that since these alleged acts by Olsen took place prior to the overt acts in furtherance of the scheme to defraud charged in the indictment, they were evidence of other crimes, wrongs or acts which should have been excluded under Fed. R. Evid. 404(b).

Under Fed. R. Evid. 404(b), other crimes, wrongs or acts by the defendant which are otherwise inadmissible may nonetheless be admissible if admitted for the purpose of showing motive, intent, preparation, plan or knowledge on the part of the defendant. Olsen's defense was apparently that he was unaware of any scheme to defraud buyers, and that if he made any misrepresentations about the cattle that he sold, he made them unknowingly since he was only passing along descriptive information to buyers which was given to him by others, including Orner. Although admission of this evidence should perhaps have been deferred until after Olsen had testified as to his purported lack of knowledge, *see United States v. Jardan,* 552 F. 2d 216, 219 (8th Cir.), *cert. denied,* 433 U. S. 912 (1977), Olsen concedes that his counsel's opening statement raised lack of knowledge as his defense. Under the circumstances of this case, and the nature of the other evidence against Olsen, we cannot say that the timing of the admission of this evidence constituted such an abuse of the trial court's discretion that reversal is warranted. *See id.* at 219.

Olsen also contends that the trial court erred in refusing to immediately furnish a transcript of his tes-

timony to the jury upon their request,[2] and that the three-year sentence imposed upon him by the District Court was excessive. We have reviewed these contentions and find them to be without merit.

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals,
Eighth Circuit.

[2]After retiring to deliberate, the trial court was informed by the jury's foreman at 6:20 P.M. that it wished to review a transcript of Olsen's testimony. The court responded to the request by advising the jury that a transcript of the testimony could not be made available until morning. Later that evening, the jury returned their verdict, convicting Olsen on three counts and acquitting him on one.

APPENDIX 2

Partial transcript of hearing before the Honorable Warren K. Urbom, Motion to Dismiss, August 28, 1978, in Lincoln, Nebraska:

"THE COURT: To expand the record a little, I might explain that the mistrial was ordered on June 5, 1978, and that is the date of the order, the written order; but the trial had preceded that; and the oral announcement of mistrial occurred on May 31, 1978.

"THE COURT: I proceeded immediately into another trial, a criminal trial on June 1. It finished on June 5. The panel of persons who tried Mr. Olsen remained on duty until June 16, and other than that one criminal trial that I mentioned, I tried one civil case.

"I was gone from the District of Nebraska from June 17 through July 16; and my recollection matches with Mr. Nolan's that it was immediately after my return that on July 17 he indicated he was ready for trial.

"I have no recollection of talking to Mr. Lott, and I do not know whether I did. In any event, I entered an order dated July 20, setting the case for retrial, to begin August 31. That setting was largely, if not entirely, dictated by other trials which began on July 25 and have gone on virtually continuously since that time, and are still going on. Hopefully we will be through with the trial I am now in, in time to begin U. S. v. Olsen on August 31.

"If I had realized that Mr. Olsen wanted an earlier trial, if, indeed, he did want an earlier trial, I could have begun his case, his retrial earlier by pushing aside some other trial already set. But I had no information or thought that he preferred an earlier trial date. He has not, to my knowledge, asked for one, but has asked instead for a dismissal of the indictment.

"I have no recollection of Mr. Nolan saying concerning a time for the new trial. (sic) I think the selection of the date of August 31 was my doing. Thus if there is a fault, it must lie with the Court, and I accept it.

"Now I observe that it is a matter of discretion now under the law as to whether some sanctions should be imposed because of a failure to begain a retrial within 60 days of the declaration of the mistrial.

"I think, in view of all the circumstances, a dismissal should not be had. There is no indication that Mr. Olsen has been prejudiced because of what has happened; and I therefore will deny the motion to dismiss, and the trial will begin as scheduled on August 31, at 9 o'clock."